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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

SABIR AL-MANSUR,

Plaintiff and Appellant,

v.

GROSS MORTGAGE CORPORATION,
et al.,

Defendants and Respondents.

A132770

(Alameda County
Super. Ct. No. RG 10-531987)

Plaintiff Sabir Al-Mansur appeals from a summary judgment in favor of defendants Gross Mortgage Corporation and Contractors' Capital Corporation (Gross Mortgage) on Al-Mansur's complaint for damages and declaratory and injunctive relief. Al-Mansur contends that property he purchased from a Chapter 13 debtor in bankruptcy was sold to him free and clear of Gross Mortgage's senior lien secured by a deed of trust. Because there is no evidence that the bankruptcy court approved sale of the property free and clear of liens, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves property at 2421 Market Street in Oakland. Al-Mansur owned the property prior to January 2006, when he sold it to Brian Fabian. Part of the purchase price paid by Fabian was provided by Gross Mortgage in the form of a \$445,000 loan secured by a deed of trust on the property. In July 2007, Fabian was in default of Gross Mortgage's loan and filed a Chapter 13 bankruptcy case.

Fabian sought an order permitting him to sell the Market Street property to Al-Mansur for \$630,000. In support of the application, Al-Mansur declared that he had been approved for a sufficient loan to complete the purchase, and that sale of the property would enable Fabian to pay off the Gross Mortgage loan. Fabian's application for an order allowing the sale also stated that the sale would permit the bankruptcy trustee to satisfy the liens against the property, including Gross Mortgage's.

The bankruptcy court approved the sale to Al-Mansur in July 2007, with the directive that "[a]ny net proceeds to [Fabian] are to be paid to the Chapter 13 Trustee to pay off the plan." Al-Mansur purchased the property and recorded the grant deed in his favor on October 5, 2007. Following his purchase, Al-Mansur made several payments on the Gross Mortgage loan in order to prevent a pending non-judicial foreclosure from proceeding. Then Al-Mansur stopped making the payments and filed his own Chapter 13 bankruptcy.

That Chapter 13 bankruptcy was dismissed after Al-Mansur fell behind on payments to be made under his plan for payment of creditors. After the case was dismissed, Gross Mortgage recorded a notice of default in January 2010 against the Market Street property. Al-Mansur then successfully moved to vacate the dismissal of his Chapter 13 case. But by July 2010, the bankruptcy case was again dismissed and Gross Mortgage was free to proceed with foreclosure. When it dismissed Al-Mansur's case for the second time, the bankruptcy court stated: "The Debtor continues to ignore the fact that, due to his acquisition of the [Market Street] Real Property without [Gross Mortgage's] consent, [Gross Mortgage's] debt has finally become due. He continues to fail to propose payments to the chapter 13 trustee sufficient to pay [Gross Mortgage's] secured claim in full over the term of the plan. The Debtor has been advised of this problem repeatedly, both in the prior Case and this one. Yet, he has made no attempt to address the problem. Under the circumstances, the court is compelled to find that the present case was filed in bad faith." The bankruptcy case was closed on October 21, 2010.

On August 19, 2010, Al-Mansur commenced this action in the Superior Court. On June 27, 2011, the trial court denied Al-Mansur's motion for a preliminary injunction that sought to prohibit Gross Mortgage from foreclosing on the property, and granted Gross Mortgage's motion for summary judgment. The trial court concluded that Al-Mansur did not demonstrate any likelihood of prevailing in this action and that he failed to raise an issue of fact in response to Gross Mortgage's showing that the property was not sold out of the bankruptcy court free and clear of its lien. On August 17, 2011, the property was sold at a trustee's sale to satisfy the Gross Mortgage debt. Al-Mansur timely appealed.

DISCUSSION

An order granting summary judgment is subject to our independent review. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860; *Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 69.) A defendant moving for summary judgment has the initial burden to show that a cause of action lacks merit because one or more of its elements cannot be established or it is subject to an affirmative defense. (Code Civ. Proc., § 437c, subd. (o); *Aguilar v. Atlantic Richfield Co.*, *supra*, at p. 850.) If the moving papers make a prima facie showing that justifies a judgment in the defendant's favor, the burden shifts to the plaintiff to show the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, at p. 849.)

Here, it was undisputed that Gross Mortgage was the holder of a note and deed of trust secured by the Market Street property that was sold by Fabian to Al-Mansur pursuant to a bankruptcy court order. The only dispute centers upon the legal effect of that order, and whether the Market Street property was conveyed to Al-Mansur free and clear of Gross Mortgage's lien. Gross Mortgage presented evidence to the trial court that demonstrated it had never appeared in the Fabian bankruptcy, that Fabian applied to the bankruptcy court to permit sale of the property to pay off liens, including Gross Mortgage's, and that Fabian was allowed to sell the property with "[a]ny net proceeds" payable to the Chapter 13 trustee to pay off the debtor's plan. In light of this evidence,

the burden shifted to Al-Mansur to show there was a triable issue of fact over whether the bankruptcy court ordered the sale free and clear of liens.

The only evidence Al-Mansur relies upon is an excerpt from paragraph 14. B. of the purchase agreement he signed with Fabian that Al-Mansur claims shows the property was sold to him free and clear of the Gross Mortgage lien. In pertinent part, paragraph 14. B. provides: “At Close Of Escrow, Buyer shall receive a grant deed conveying title, . . . owned by Seller. Title shall be subject to all encumbrances, easements, covenants, conditions, restrictions, rights and other matters that are of record or disclosed to Buyer prior to Close Of Escrow, unless otherwise requested in writing by Buyer and agreed by Seller within the time specified in paragraph 15. However, title shall not be subject to any liens against the Property, except for those specified in this Agreement.” Paragraph 15 of the agreement pertains to inspection reports and removal of contingencies, and has no application to this dispute.

In context, it is obvious that the language Al-Mansur relies upon to raise an issue of fact over whether the bankruptcy court sold the property free and clear of liens does no such thing. Paragraph 14. B. states that the parties agreed to sell the property subject to encumbrances of record or those disclosed to Al-Mansur. The record is clear that Al-Mansur was aware of Gross Mortgage’s lien when he filed a declaration in support of Fabian’s application seeking the bankruptcy court’s permission to sell the property. The assurance in paragraph 14. B., that the property is not subject to any liens, in context, refers to liens that are neither of record nor disclosed to the buyer. The purchase agreement simply does not have the significance that Al-Mansur ascribes to it.

Al-Mansur’s remaining arguments regarding the legal effect of the sale all fail for the same simple reason. He did not provide the trial court with any evidence that the sale by the bankruptcy court was intended to be free and clear of Gross Mortgage’s lien, and Gross Mortgage provided evidence that it was not so intended.

A debtor-in-possession in a Chapter 13 case can seek court approval to sell property of the estate free and clear of liens. (11 U.S.C. § 363 (b) & (f).) But in order to do so, the debtor must file and serve a motion on the lienholder specifically requesting

such relief. (Fed. Rules Bankruptcy Proc., rules 6004, 9014.) The motion must also comply with the Bankruptcy Local Rules for the United States District Court for the Northern District of California. Bankruptcy Local Rule 6004-1 specifically governs motions to sell property free and clear of liens. The motion must identify the affected lienholder below the caption, and be supported by a declaration demonstrating that the relief sought falls within the requirements of 11 U.S.C. section 363. (Local Rules of U.S. Bankruptcy Ct., Northern Dist. of Cal., rule 6004-1(a) & (b).) Moreover, an order granting such a motion shall specify each lienholder whose interest is affected by the order. (Local Rules of U.S. Bankruptcy Ct., Northern Dist. of Cal., rule 6004-1(d).) The record of the bankruptcy court pertaining to the sale of the property from Fabian to Al-Mansur reflects no fulfillment of any of these requirements.

There is also evidence that the bankruptcy court never considered the sale to Al-Mansur to be free and clear of Gross Mortgage's lien. When it dismissed Al-Mansur's bankruptcy, the court observed that: "The Debtor continues to ignore the fact that, due to his acquisition of the [Market Street] Real Property without [Gross Mortgage's] consent, [Gross Mortgage's] debt has become fully due. He continues to fail to propose payments to the chapter 13 trustee sufficient to pay [Gross Mortgage's] secured claim in full over the term of the plan. The Debtor has been advised of this problem repeatedly, both in the prior Case and this one. Yet, he has made no attempt to address the problem. Under the circumstances, the court is compelled to find that the present case was filed in bad faith."

DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

McGuinness, P.J.

Pollak, J.